79-1808

Supreme Court, U.S.
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In The

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1529

ROBERT VERNE BONFOEY,

*Petitioner,*

*vs.*

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

*Respondent.*

*Petition for Writ of Certiorari*
*To The United States Court of Appeals*
*For the Fifth Circuit*

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

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*For the Fifth Circuit*

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 16, 1980.

## CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, granting Respondent's motion for summary judgment is printed in Appendix C hereto and is not reported. The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Northern District

of Texas, Dallas Division, is printed in Appendix A hereto, and is not yet reported in the official reports.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, was entered on January 16, 1980. The Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing by Order entered on February 13, 1980, which is printed in Appendix B hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## THE QUESTION PRESENTED

When state law is to be applied in a federal diversity case and the federal district court hearing the case is not a district court in the state or district whose law is to be applied and the recent decisions from the courts of the state reflect a developmental trend in the area under consideration, is it an improper exercise of judicial federalism for the court of appeals to fail to utilize the available certification procedure to properly determine the state's law on the issue being appealed?

## STATUTE INVOLVED

The Alabama statute providing of the certification procedure to the Alabama Supreme Court is Alabama Constitution Article 6, §140(b)(3). This provision is printed in Appendix D hereto.

## STATEMENT

Petitioner is an individual who filed suit in the United States District Court for the Northern District of Texas,

Dallas Division, against Unionmutual Stock Life Insurance Company of America (hereinafter called "Unionmutual") and the Equitable Life Assurance Society of the United States, the Respondent herein. Jurisdiction in the federal courts is predicated on diversity of citizenship. Petitioner's lawsuit is an action for long-term disability insurance benefits under a group policy which was issued to Petitioner's employer and which covered Petitioner while he was employed in Alabama. Alabama's insurance law governs Petitioner's case.

**A. Basis of Petitioner's Cause of Action.**

Petitioner contended in his lawsuit that certain theories of estoppel and waiver were applicable under Alabama insurance law to bring him within certain provisions of the insurance policies sued upon. In particular, Petitioner alleged that his employer in Alabama had acted as the insurers' agent with respect to Petitioner and as a result of the employer's intentional conduct, the waiting period condition and the "actively at work" provisions of the policies were waived and the insurer was promissorily estopped to assert certain defenses to Petitioner's claim. Petitioner presented competent evidence on these issues to the District Court.

**B. The District Court's Action.**

The United States District Court for the Northern District of Texas, Dallas Division, Judge Robert W. Porter presiding, granted summary judgment in favor of Unionmutual on January 26, 1977. Petitioner did not appeal from that judgment.

The District Court later granted summary judgment in favor of Respondent on February 1, 1978. In essence, the District Court's opinion for summary judgment was not predicated upon the failure of Petitioner to produce sufficient evidence on Petitioner's waiver and estoppel grounds, but was based upon the District Court's opinion that waiver and estoppel theories could not enlarge the coverage of insurance policies under the District Court's interpretation of Alabama insurance law. Petitioner duly perfected his appeal from that judgment to the Court of Appeals for the Fifth Circuit.

**C. Proceedings in the Court of Appeals.**

The Court of Appeals for the Fifth Circuit considered Petitioner's appeal, but affirmed the judgment of the District Court. The Court of Appeals specifically denied Petitioner's argument that the actively at work condition and the waiting period provision of the policy could be waived. On the same basis as the District Court, it concluded that Petitioner's theories of waiver and estoppel could not apply to these provisions because they would enlarge the coverage of insurance policies contrary to its interpretation of Alabama insurance law.

Petitioner filed his petition for rehearing requesting that the Court of Appeals certify certain legal questions regarding his estoppel and waiver theories to the Alabama Supreme Court to obtain a definitive statement regarding how it would rule on these previously undetermined issues of Alabama insurance law. Petitioner's petition for rehearing was summarily denied by order dated February 13, 1980.

## REASON FOR GRANTING THE WRIT

This petition raises an important question of appellate procedure. Although Petitioner's basic cause of action is not constitutionally or publicly significant, his case does present a significant procedural point which impacts on most federal diversity actions. The appropriate rule or appellate standard which Petitioner seeks to establish is that the Courts of Appeal are duty-bound to freely certify questions of state law (if such procedure is available to them) to the appropriate state court especially when the federal district court from which the appeal arose does not sit in the state whose law is being applied and especially in situations where the underlying state law is in a period of recent development.

In Petitioner's case the Texas federal district court applied a much-used, but very vague, quotation from several Alabama cases to-wit: "waiver and estoppel cannot enlarge the coverage of insurance policies." The Texas federal district court and the Court of Appeals applied this relatively simple phrase to all of the provisions of the policy to which Petitioner was asserting his theories of waiver or estoppel. Neither Court cited any Alabama decision holding that these specific types of policy provisions were related to insurance risks or coverage. In fact, Petitioner presented competent summary judgment evidence that the waiting period condition of the policy (in excess of 30 days) was not premium related but was merely a feature of the policy which facilitated the employer's self-administration of the policy for its employees. Both lower courts undoubtedly thought they were properly applying the

applicable Alabama law, which they had a duty to do under *Erie Railroad Co. vs. Thompkins,* 304 U.S. 64 (1938).

Petitioner has filed this writ of certiorari because he does not believe that the Texas District Court nor the Court of Appeals applied Alabama law to his case, as the Alabama Supreme Court would have determined it to be.

Just prior to Petitioner's appeal there had been two recent developments in Alabama insurance law which related to the issues in Petitioner's cause. First, Alabama law had just recently addressed the group insurance agency question and had adopted the minority position on this point, to the effect that an employer could be the agent for the insurer in self-administered policy situations. *Blue Cross-Blue Shield of Alabama vs. Thornton,* 325 So.2d 187 (Ala. Civ. App. 1975). Second, Alabama law had just recently recognized the theory of promissory estoppel to provide coverage in the insurance field. *United States Fidelity & Guaranty Co. v. McKinnon,* 356 So.2d 600 (Ala. Sup. 1978). These were significant developments in Alabama's insurance law and reflected a modern and liberal trend to these issues. The implications of these decisions significantly discredit the prior Alabama law in this area, which was the basis of the District Court's and the Court of Appeal's judgments. At a minimum, the state of the Alabama insurance law in this area was uncertain at this time. In the face of this uncertain state of the law, the District Court sitting in Texas and the Court of Appeals sitting in Louisiana determined what Alabama's law was, or should be, on these points, all without the benefit of

Alabama's determination of same and, notwithstanding the certification procedure available to the Court of Appeals.

Certainly the certification process which many states have afforded the federal courts, and in this instance Alabama's certification statute, is a plea to the federal courts to let the states determine their law in a consistent and dynamic way. Obviously, the states with such statutes do not consider it to be a burden when called upon to assist the federal courts in determining their state law. By utilizing the certification procedure, the burden of correctly applying relatively uncertain or rapidly developing state law is alleviated from the federal courts. A definitive standard for utilizing this beneficial procedure should be pronounced by this Supreme Court.

Petitioner's case was a prime candidate for certification and yet it was not certified. It is Petitioner's opinion that as a result of the Court of Appeal's failure to certify issues in his case, at this critical developmental stage of Alabama's insurance law, that these federal courts have applied, and will be applying in the future, Alabama law which is a step behind the actual trend of the law on these issues in the State of Alabama.

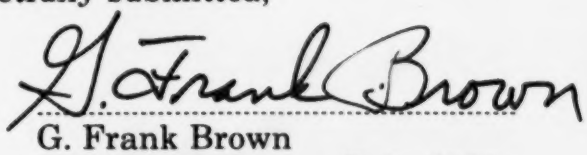
This Court has previously announced its favor of the certification procedure in the situation where a federal district court attempts to apply the law of a state which is foreign to the state or district in which the federal court is sitting. *Bishop vs. Wood,* 426 U.S. 341, 345-346 (1976). This Court should now further instruct the Courts of

Appeal to freely utilize the certification procedure available to them when a state's law has made a recent change in direction or development, or has entered into a previously uncharted area of the law in that state. This is a minimum requirement if the federal courts are to properly exercise their *Erie* duties. As state law becomes more dynamic in these changing times, it is of public importance that the federal courts be instructed to turn to the invaluable tool, the certification procedure, to properly keep pace with the state's law, and thus to energize the *Erie* doctrine to its fullest potential.

## CONCLUSION

This petition for certiorari should be granted so that fundamental justice may be done.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Mr. Larry M. Lesh, Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201, this 9th day of May, 1980.

G. Frank Brown

G. Frank Brown

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1529

ROBERT VERNE BONFOEY,
*Plaintiff-Appellant,*

*versus*

UNION MUTUAL STOCK LIFE
INSURANCE CO. OF AMERICA,
*Defendant,*

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
*Defendant-Appellee*

*Appeal from the United States District Court*
*for the Northern District of Texas*

Before MORGAN, REAVLEY AND HATCHETT, Circuit Judges. HATCHETT, Circuit Judge:

In this diversity case the appeal is from an order of summary judgment in favor of the appellee-insurer granted on grounds that the appellant's disability is excluded from the coverage of the policy in dispute. We affirm.

Appellant, Robert Bonfoey, began employment with Jack's Food Systems (Jack's) on July 22, 1974. On September 17, 1974, he was hospitalized because of a heart ailment. He returned to work at Jack's on January 6, 1975. His heart ailment subsequently led to his

disability, which commenced on November 6, 1975.

On July 22, 1974, when appellant began work, Jack's held a long term disability policy issued by Unionmutual, covering "all salaried officers, administrative and managers." The policy provides for a ninety day waiting period before it becomes effective. Additionally, it provides that coverage will not become effective after the ninety day waiting period unless the employee is actively at full-time work. Excluded from coverage is any disability commencing during the first twelve months the insurance is in force, if the disability is caused by a disease or ailment contracted or treated during the three month period prior to the effective date of insurance.[1]

On May 1, 1975, Jack's terminated the Unionmutual policy and placed all of its group insurance with Equitable Life Assurance Society of the United States (Equitable). The Equitable policy contained a two year pre-existing condition exclusion for any disability which manifested itself within twelve months prior to the effective date of insurance.[2] Equitable also agreed to cover any disability which would have been covered by the Unionmutual policy. This action was brought to determine appellant's entitlement to disability insurance benefits under the policies held by Jack's.

The trial court found that the appellant's disability was not covered by the Unionmutual policy because his coverage did not become effective until January of 1975, when he actually returned to the office. The trial court concluded that the disability, therefore, occurred during the first twelve months the insurance was in effect; and

because the disability resulted from an ailment contracted within the three month waiting period, it was within the policy's excluison. The trial court further concluded that although officers of Jack's told the appellant he was covered, this was insufficient to enlarge the coverage of the policy. Summary judgment was granted for the appellee. Our task is to review the trial court's grant of summary judgment for correctness.

Appellant asserts that the trial court erred in granting summary judgment in favor of the appellee because material issues of fact were presented by the pleadings. The appellant argues that Jack's, as Unionmutual's agent, effectively waived the ninety day eligibility waiting period of the policy. Appellant also contends that Jack's, as Unionmutual's agent, waived the "actively at work condition" of the policy based upon Unionmutual's retention of premiums during the period he was allegedly not covered. Appellant further argues that performance of certain of his regular work created a fact issue as to when he returned to work within the meaning of the policies.

A motion for summary judgment should be granted only if there is no genuine issue as to any material fact and the moving party, as a matter of law, is entitled to judgment. Fed.R.Civ.P. 56(c). *See. e.g., Aulds v. Foster,* 484 F.2d 945 (5th Cir. 1973). This court has cautioned against use of summary judgment procedure in cases for which it is not designed. *XRT, Inc. v. Krellenstein,* 448 F.2d 772 (5th Cir. 1971). 'Summary judgments are looked upon with favor" where there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. *Bruce v. Travelers Insurance Co.*, 266 F.2d 781, 786 (5th Cir. 1959); *United States for Use of Edward E. Morgan Co. v. Maryland Casualty Co.*, 147 F.2d 423, 425 (5th Cir. 1945).

The pivotal issue involves determining the effective date of the insurance. If the policy is enforced as written, it is clear that appellant's disability is not covered. This is because the policy expressly excludes any disability commencing during the first twelve months the insurance is in effect, if the disability is caused by a disease contracted or treated during the ninety day period prior to the effective date of insurance. Under the policy, there was a ninety day waiting period wherein the coverage did not become effective unless the employee was actively at work. The trial court concluded that the appellant did not return to active work for purposes of the policy, until January 6, 1975, when he actually returned to the office at Jack's. This finding is in accord with Alabama law. *See White v. Massachusetts Mutual Life Insurance Co.*, 157 So.2d 6 (Ala. 1963). Thus, the disability which commenced within twelve months of appellant's return to active full-time work was excluded from the contract as written.

Appellant argues that because Jack's told him that he was covered immediately upon being employed, the effective date of insurance was July 22, 1974. We find that the trial court correctly concluded that no genuine issue of material facts was presented by this undisputed allegation. Under Alabama law, Jack's clearly had no

authority to enlarge or expand the coverage of the Unionmutual policy. *Aetna Insurance Co. v. Pete Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972). The present record is devoid of any evidence showing that the officers of Jack's were agents of Unionmutual, other than for the collection of premiums and administration of the policies. In *Liberty National Life Insurance Co. v. Staggs*, 6 So.2d 432 (Ala. 1942), the Alabama Supreme Court stated:

> We have recognized the general rule that an agent whose authority is limited to soliciting insurance, delivering policies, and collecting premiums has no power to change stipulations in a contract of insurance: that to do so he must either be a general agent or be specially so authorized or his course of dealing to that extent have been ratified expressly or impliedly.

6 So.2d at 433.

The court went on to state: "And for like reasons such an agent cannot make a binding contract of insurance or to insure." *Id.* Further, the policy contains a provision stating that no agent has authority to change or waive the provisions of the policy. This provision is valid and enforceable under Alabama law. *First National Life Insurance Co. of America v. Rector*, 142 So. 392 (Ala. 1932).

Appellant's contention that Jack's, as Unionmutual agent, waived the "actively at work condition" of the policy based upon Unionmutual's retention of premiums during the period he was not covered, is without merit. It is well-established in Alabama law that theories of waiver and estoppel cannot extend or enlarge the

coverage of an insurance policy. *Aetna Insurance Co. v. Peter Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972).

The appellant has failed to establish the presence of factual issues. We hold the grant of summary judgment to be proper; accordingly, the judgment is affirmed.

AFFIRMED.

## FOOTNOTES

[1] The Unionmutual policy provided in pertinent part:

> EFFECTIVE DATES OF INSURANCE: . . .
> The insurance of any eligible employee shall become effective on:
>
> (1) Such employee's 'eligibility date' as hereinafter defined, providing he makes application for the insurance on or before such date . . .
>
> The eligibility date for any employee, as used herein, means the date upon which the employee first became eligible for insurance under this Policy in a particular class, as set forth in the Application herefor . . . .
>
> * * *
>
> Notwithstanding the foregoing, no insurance shall become effective on a date when an employee is not actively at full-time work because of a disability resulting from sickness or injury. In such case, the insurance shall not become effective until the next following day upon which such employee is actively at work within his eligible class.
>
> * * *
>
> EXCLUSIONS: This policy does not cover:
>
> (a) any disability commencing during the first twelve months that the insurance is in force with respect to the Employee if the disability is caused or contributed to by, or is a consequence of, a disease or injury for which the Employee received medical treatment, or services, or took prescribed drugs or medicines during the three month period immediately prior to the effective date of such insurance. . . .

The provision for the 90 day waiting period for eligibility was contained in Jack's application for the policy. However, the policy provided that: "ENTIRE CONTRACT-CHANGES: This policy, the application of the Policyholder and any individual application, a copy of which has been provided to the individual, constitute the entire contract between the parties. . . ."

[2] The Equitable policy provided in part that:

> No benefits shall be payable under this policy . . .
>
> . . . .
>
> 5. for a period of disability commencing within the first two years after the effective date of the employer's insurance under this policy if such disability is caused or contributed to by injury occurring or sickness contracted prior to such effective date or by any condition related to such injury or sickness and such injury, sickness or related condition manifested itself within twelve months prior to such effective date. . . .

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1529

ROBERT VERNE BONFOEY,
*Plaintiff-Appellant,*

*versus*

UNION MUTUAL STOCK LIFE
INSURANCE CO. OF AMERICA,
*Defendant,*

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
*Defendant-Appellee*

*Appeal from the United States District Court*
*for the Northern District of Texas*

**ON PETITION FOR REHEARING**
(February 13, 1980)

Before MORGAN, REAVLEY and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Joseph W. Hatchett
United States Circuit Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-76-0920-F

ROBERT VERNE BONFOEY

versus

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES

## ORDER

Defendant The Equitable Life Assurance Society of the United States has moved for summary judgment on the grounds that the Plaintiff's disability is excluded from the coverage of the Defendant's policies and that coverage cannot be enlarged by waiver or estoppel. Summary judgment has previously been entered denying recovery against Union Mutual Life Insurance Company, originally named as a party defendant.

The uncontroverted facts show the following: On October 1, 1973, Unionmutual issued policy No. 51072 to Jack's Food Systems, Inc. The policy excluded from coverage:

> (a) any disability commencing during the first twelve months that the issuance is in force with respect to the Employee if the disability is caused or contributed to by, or is a consequence of, a disease or injury for which the Employee received medical treatment, or services, or took prescribed drugs or medicines during the three month period

> immediately prior to the effective date of such insurance . . .

Plaintiff was employed on July 22, 1974. Under the terms of the Unionmutual policy he would have become eligible for coverage on October 22, 1974. The Plaintiff, however, was told by his employer that the long term disability coverage with Unionmutual was effective immediately. On September 17, 1974, within the ninety day waiting period, the Plaintiff was hospitalized for a heart ailment. The ailment subsequently led to the Plaintiff's disability which is the basis for this cause of action. In May of 1975 Jack's Food Systems, Inc. terminated prior coverage and placed all of its group insurance with Equitable, including policy No. 19794LT effective May 1, 1975, which provided long term disability benefits for employees of Jack's Food Systems, Inc. The Equitable policy provided that no benefits were payable thereunder:

> [F]or a period of disability commencing within the first two years after the effective date of the employee's insurance under this policy if such disability is caused or contributed to by injury occurring or sickness contracted prior to such effective date or by any condition related to such injury or sickness and such injury, sickness or related condition manifested itself within twelve months prior to such effective date.

Equitable, however, contractually agreed to cover any disability which would have been covered by the Unionmutual policy.

The Plaintiff, based on his belief that he was covered under the Unionmutual policy, and therefore under the

Equitable policy, filed a claim for benefits with Equitable. Equitable representatives, predicated upon the assurances of the Plaintiff that he was covered by the Unionmutual policy, advised the Plaintiff that his disability was covered by the Equitable policy. Equitable subsequently denied coverage and Plaintiff brought this action.

Plaintiff instituted this action on July 7, 1976 and established diversity jurisdiction under 28 U.S.C. §1332. Plaintiff alleges that the Defendant Equitable has wrongfully denied coverage and refused to pay benefits under the above mentioned insurance policies. All parties agree that Alabama law controls this case.

The Plaintiff's claim turns on whether he was covered under the Unionmutual policy, and therefore under the Equitable policy. Because the disability was a consequence of an ailment which was contracted within the three month waiting period, liability depends on whether the disability occurred within twelve months after the effective date of the insurance with respect to the Plaintiff. This in turn requires a determination of when the Unionmutual coverage became effective as to the Plaintiff. Ordinarily the effective date would have been October 22, 1974, three months from the date of employment.

The Unionmutual policy, however, provided that:

> [N]o insurance shall become effective on a date when an employee is not actively at full time work because of a disability resulting from sickness or injury. In such case, the insurance shall not become effective until the next following day upon which such

employee is actively at work . . .

Plaintiff was not "actively at full time work" on October 22, 1974 and did not return to his office until January of 1975.

Equitable denies coverage under the Unionmutual policy because the disability arose from an ailment contracted during the three-month waiting period; therefore any disability arising from the ailment would be excluded if the disability commenced within the first twelve months that the insurance was in force with respect to the employee. Equitable alleges that under the terms of the contract the insurance did not become effective with respect to the Plaintiff until January of 1975 when he returned to the office and was actively at full-time work. Because the disability occurred before January, 1976, the disability fell within the exclusion from coverage provision contained in the Unionmutual policy. The Plaintiff, however, alleges that Jack's Food Systems, Inc. was the agent for the insurer, Unionmutual, in dealing with Jack's employees; and that Jack's, in that capacity, waived with respect to the Plaintiff, the waiting period and/or "actively at full-time work" requirements of the Unionmutual policy. Alternatively, Plaintiff argues that by working at home he satisfied the return to work requirement prior to November 6, 1974, and therefore, his disability, which he claims occurred on November 6, 1975, did not occur within twelve months of the effective date of the insurance, and was covered by the Unionmutual policy.

Plaintiff's arguments fail because his disability does

not fall within the coverage of either the Equitable policy or the Unionmutual policy; and that coverage cannot be enlarged by waiver or estoppel. I find that Plaintiff's disability was not covered by the Equitable policy because it was caused by an ailment which was contracted within twelve months preceeding May of 1975, the effective date of that policy. I additionally find that the Plaintiff's disability was not covered by the Unionmutual policy because his coverage did not become effective until January of 1975, when he actually returned to the office. Under Alabama law the Plaintiff's work at home did not satisfy the return to full time work requirement for the commencement of insurance coverage under the Unionmutual policy. *White v. Massachusetts Mutual Life Ins. Co.,* 157 So.2d 6 (Ala. 1963). The disability, therefore, occurred during the first twelve months the insurance was in force; and because it was caused by an ailment contracted within the three month waiting period, was within the exclusion from coverage.

Despite the fact that officers of Jack's Food Systems, Inc. and employees of Equitable stated that the Plaintiff's disability was covered, I find that under Alabama law, waiver and estoppel cannot enlarge the coverage of insurance policies. *Aetna Ins. Co. v. Pete Wilson Roofing and Heating Co., Inc.,* 272 So.2d 232 (Ala. 1972); *Alabama Farm Bureau Mutual Casualty Ins. Co. v. Adams,* 267 S.2d 151 (Ala. 1972).

Accordingly, on these grounds, the motion for

summary judgment will be, and hereby is GRANTED as to the Defendant.

It is so ORDERED.

Robert W. Porter
United States District Judge

DATE February 1, 1978

## APPENDIX D

**Certified questions from federal courts.**

(a) *When certified.* When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme court of Alabama for instructions concerning such questions or propositions of state law, which certified question the supreme court of this state, by written opinion, may answer.

(b) *Jurisdiction.* Questions or propositions of law referred to in subdivision (a) hereof shall be certified for answer to the supreme court.

(c) *Method of invoking rule.* The provisions of this rule may be invoked by any of the federal courts upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

(d) *Contents of certificate.* The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

(e) *Preparation of certificate.* The certificate shall be certified to the supreme court by the clerk of such federal court and under its official seal. The supreme court may, in its discretion, require the original or copies of all or any

portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said certified question.

(d) *Costs.* The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the supreme court.

(g) *Briefs and argument.* The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 28 days (four weeks) after the filing of said certificate in the supreme court. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 21 days (three weeks) after the receipt of the appellant's or moving party's brief and a reply brief may be filed within seven days (one week) thereafter.

(h) *Oral argument.* Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.